

SERVICE DATE – SEPTEMBER 11, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35601

BNSF RAILWAY COMPANY—TRACKAGE RIGHTS EXEMPTION—
UNION PACIFIC RAILROAD COMPANY

Digest:¹ The Board denies a request to revoke the notice of exemption for BNSF Railway Company to operate over a 14.1-mile portion of a rail line owned by Union Pacific Railroad Company in Lafourche Parish, La.

Decided: September 10, 2013

By decision served on June 19, 2013 (June 19 Decision), the Board allowed an exemption to take effect for BNSF Railway Company (BNSF) to acquire trackage rights over a portion of a line of railroad known as the Lockport Branch, owned by Union Pacific Railroad Company (UP), in Lafourche Parish, La. (the Lockport Branch or the Line).² On July 9, 2013, Louisiana & Delta Railroad, Inc. (LDRR) filed a petition to reconsider that ruling.³ For the reasons discussed below, the Board will treat LDRR's petition as a petition to reopen and revoke the trackage rights exemption and will deny LDRR's petition.

BACKGROUND

In a combined verified notice of exemption filed on September 29, 2011, UP and LDRR sought exemptions to abandon and discontinue service over, respectively, a portion of the Line

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² In the same decision, the Board also allowed an exemption to take effect in Docket No. AB 33 (Sub-No. 277X) for UP's discontinuance of service over a different, but overlapping, portion of the Lockport Branch.

³ LDRR also submitted a petition to intervene. However, the Board does not typically require a petition to intervene from a person seeking to reopen and revoke an exemption that has become effective. See, e.g., Watco Holdings, Inc.—Acquis. of Control Exemption—Wis. & S. R.R., FD 35573 (STB served Mar. 22, 2012); Tenn. S. R.R.—Corporate Family Transaction Exemption—Sacramento Valley Ry., FD 35449 (STB served Mar. 6, 2012); Grenada Ry.—Acquis. & Operation Exemption—Ill. Cent. R.R., FD 35247 (STB served Dec. 3, 2009).

between milepost 1.7 near Raceland, Louisiana, and milepost 14.2 near Jay, Louisiana, a distance of 12.5 miles. Notice of the exemptions was served and published in the Federal Register on November 14, 2011 (76 Fed. Reg. 70,534).⁴

On December 6, 2011, BNSF submitted, in both the abandonment and discontinuance dockets, a letter asserting that it has authority sanctioned by the Board to serve customers on the Line, including the portion that UP sought to abandon, and arguing that UP should not be permitted to consummate abandonment until BNSF voluntarily discontinues its authority to serve customers on the Line. UP contested BNSF's claim.⁵ In light of that dispute, the Board postponed the effectiveness of UP's abandonment exemption.⁶ Meanwhile, LDRR's discontinuance exemption took effect, and LDRR filed a notice of consummation of its discontinuance of operations over the Line between mileposts 1.7 and 14.2, effective December 31, 2011.⁷

On February 21, 2012, BNSF filed, in Docket No. FD 35601, a verified notice of exemption under 49 C.F.R. § 1180.2(d)(7) for trackage rights over 14.1 miles of the Lockport Branch between milepost 0.1 at Raceland Junction and milepost 14.2 near Jay (that is, over the portion of the Line covered by the abandonment and discontinuance dockets, plus the portion between mileposts 0.1 and 1.7 over which LDRR claims to still operate). Notice of the exemption was served and published in the Federal Register on March 8, 2012 (77 Fed. Reg. 14,058). BNSF submitted a copy of the trackage rights agreement with UP (First Supplemental Agreement) with its verified notice of exemption.⁸

⁴ See Union Pac. R.R.—Aban. Exemption—in Lafourche Parish, La., AB 33 (Sub-No. 277X) (STB served Nov. 14, 2011) (the abandonment docket); La. & Delta R.R.—Discontinuance of Serv. Exemption—in Lafourche Parish, La., AB 318 (Sub-No. 7X) (STB served Nov. 14, 2011) (the discontinuance docket).

⁵ See UP letters submitted December 23, 2011, and January 18, 2012. On January 6, 2012, BNSF submitted a letter replying to UP.

⁶ See Union Pac. R.R.—Aban. Exemption—in Lafourche Parish, La., AB 33 (Sub-No. 277X) (STB served Jan. 30, 2012).

⁷ See Notice of Consummation, Docket No. AB 318 (Sub-No. 7X) (filed Dec. 28, 2011). LDRR stated in its notice of consummation that its discontinuance did not affect the remainder of the Lockport Branch between milepost 0.1 and milepost 1.7, and that it continues to operate over that portion of the Line. See also Pet. 2.

⁸ BNSF explained that this agreement, dated August 1, 2000, is a supplement to the Trackage Rights Agreement dated September 10, 1998, between UP and BNSF. The trackage rights set forth in the original, September 10, 1998 agreement were authorized by the Board in Burlington Northern & Santa Fe Railway Co.—Trackage Rights Exemption—Union Pacific Railroad Co., FD 33663 (STB served Oct. 19, 1998).

On March 15, 2012, UP filed a petition to reject BNSF's notice of exemption for trackage rights. UP filed a motion on September 20, 2012, to modify its notice of exemption in the abandonment docket to permit only UP's discontinuance of service over the same portion of the Line it had previously sought to abandon. Then, in a pleading submitted on October 17, 2012, UP stated that, "if the Board grants UP's motion and confirms that publication of BNSF's notice of exemption does not in and of itself allow BNSF to operate over the Line, UP would not object if the Board also confirms that BNSF has rights to serve present and future shippers on the Line 'pursuant to the terms and conditions of the governing agreements.'"⁹

In its June 19 Decision, the Board granted UP's motion to change its abandonment exemption to an exemption for discontinuance of service only and allowed that discontinuance exemption to take effect. The Board also denied UP's petition to reject BNSF's trackage rights notice of exemption and allowed that exemption to take effect. In doing so, the Board declined to interpret the terms of the First Supplemental Agreement, which addresses those trackage rights.

LDRR filed its petition for reconsideration on July 9, 2013,¹⁰ and BNSF replied on July 29, 2013.

DISCUSSION AND CONCLUSIONS

Because BNSF's trackage rights exemption has gone into effect, LDRR's request to reconsider this exemption is properly treated as a petition to reopen and revoke the exemption under 49 U.S.C. § 10502(d).¹¹ Under 49 U.S.C. § 10502(d), an exemption may be revoked, in whole or in part, if the Board finds that regulation of the transaction is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. Under 49 C.F.R. § 1115.3(b), the petition must state in detail whether revocation is supported by material error, new evidence, or substantially changed circumstances. See N.Y. Cent. Lines—Aban. Exemption—in

⁹ UP October 17 Reply, Docket No. AB 33 (Sub-No. 277X), at 4.

¹⁰ Although LDRR states that BNSF did not serve LDRR with a copy of its trackage rights notice (Pet. 3), it appears that LDRR was served with BNSF's December 6, 2011 and January 6, 2012 letters referring to BNSF's contention that it has Board authority to provide rail service over the Lockport Branch, as both letters were filed in both the abandonment and discontinuance dockets and include certificates indicating service on "all parties of record." Assuming LDRR received these letters or was otherwise aware of the dispute between BNSF and UP, it is unclear why LDRR waited until after the Board acted on the dispute to raise its concerns regarding BNSF's intent to operate over the Line.

¹¹ See, e.g., Watco Holdings, Inc.—Acquis. of Control Exemption—Wis. & S. R.R., FD 35573, slip op. at 1-2 (STB served Mar. 22, 2012); Elk River R.R.—Constr. & Operation Exemption—Clay & Kanawha Cntys., W. Va., FD 31989, slip op. at 1 n.3 (STB served Apr. 11, 1997).

Montgomery & Schenectady Cntys., N.Y., AB 565 (Sub-No. 14X) (STB served Jan. 22, 2004). The party seeking revocation has the burden of showing that regulation is necessary to carry out the RTP, 49 C.F.R. § 1121.4(f), and petitions to revoke must be based on reasonable, specific concerns demonstrating that revocation of the exemption is warranted and more detailed scrutiny of the transaction is necessary. See Consol. Rail Corp.—Trackage Rights Exemption—Mo. Pac. R.R., FD 32662 (STB served June 18, 1998).

Here, BNSF met the requirements of the Board’s class exemption at 49 C.F.R. § 1180.2(d)(7) for acquisition of trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers. Section 1180.2(d)(7) requires that such trackage rights be: (i) based on written agreements, and (ii) not filed or sought in responsive applications in rail consolidation proceedings. As noted, BNSF filed its written trackage rights agreement with UP (the First Supplemental Agreement) together with its verified notice of exemption. No party has alleged that the trackage rights in question were filed or sought in responsive applications in rail consolidation proceedings.

LDRR argues that, with respect to the portion of the Line over which it continues to operate (between milepost 0.1 and milepost 1.7), BNSF does not have a written trackage rights agreement with the appropriate carrier. According to LDRR, § 1180.2(d)(7) requires BNSF to have a written trackage rights agreement with the carrier that “operates” the portion of the Line in question, which is LDRR and not UP.¹² Section 1180.2(d)(7), however, does not contain such a limitation. The class exemption specifically applies to the acquisition or renewal of trackage rights by a rail carrier over lines either “owned *or* operated by any other rail carrier or carriers.” 49 C.F.R. § 1180.2(d)(7) (emphasis added). The regulation itself thus does not require the written trackage rights agreement to be an agreement only with another carrier that may be operating over the line. Indeed, such a requirement would be unreasonable, as a line owner may choose to grant trackage and/or operating rights to more than one carrier over the same segment. While a line owner’s decision to grant operating rights or trackage rights to more than one carrier could in a specific situation constitute a breach of contract, such an issue would need to be resolved in another forum.¹³ Accordingly, LDRR’s reliance on Chesapeake & Ohio Railway Co.—Abandonment—Between Manistee & Bay View, Michigan & Between Traverse City & Rennie, Michigan, 366 I.C.C. 53, 54 (1981) and Winamac Southern Railway Co.—Trackage Rights Exemption—A&R Line, Inc., FD 35208 (STB served Jan. 9, 2009) is misplaced.¹⁴ In this case, the Board has not “require[d] a carrier to grant trackage right[s] over its lines.” Chesapeake & Ohio, 366 I.C.C. at 54. Rather, the Board granted an exemption for a trackage rights

¹² Pet. 7-8.

¹³ See, e.g., Sioux Valley Reg’l R.R. Auth.—Trackage Rights Exemption—Lines of South Dakota, FD 34646, slip op. at 4 (STB served Jan. 19, 2005); D&I R.R.—Trackage Rights Exemption—South Dakota, FD 34646 (Sub-No. 1), slip op. at 4 (STB served Jan. 19, 2005).

¹⁴ See Pet. 7-8.

agreement between two willing parties, one of which is the line owner. The trackage rights set forth in the First Supplemental Agreement were volitional on the part of both UP and BNSF.¹⁵ The specific scope of the trackage rights available to BNSF under the submitted agreement, however, as well as any relationship they may have to the lease and operating rights granted by UP to LDRR under their agreement, are matters of contractual interpretation among the parties to the agreements.

LDRR suggests that there is a dispute over the validity of the First Supplemental Agreement, and as a result, that it does not qualify as the written trackage rights agreement required under § 1180.2(d)(7).¹⁶ But there has been no dispute over the validity of the First Supplemental Agreement. Rather, UP raised a dispute over the circumstances under which the trackage rights set forth in this agreement would apply,¹⁷ but it did not contend that BNSF lacked a valid trackage rights agreement with UP on this Line. Thus, although the Board's June 19 Decision declined to interpret the terms of the First Supplemental Agreement or determine when BNSF's trackage rights would apply, the Board was not presented with, and did not find, "a dispute over the continuing validity of [the] agreement."¹⁸

Finally, LDRR argues that BNSF's trackage rights under the First Supplemental Agreement are contrary to the terms of the September 1, 2000 Joint Operating Agreement between BNSF and UP. Specifically, LDRR asserts that the Joint Operating Agreement granted BNSF access rights only over certain branches and spurs that were "[then] owned or controlled by [UP] or as is added to the ownership of [UP]."¹⁹ According to LDRR, the grant of access rights to BNSF over branches and spurs "owned or controlled" by UP does not apply to the portion of the Line over which LDRR still operates because, although UP owned this segment, LDRR "controlled" it.²⁰ In essence, LDRR asks the Board to hold that one contract between BNSF and UP (the First Supplemental Agreement) violates another agreement between BNSF and UP (the Joint Operating Agreement).²¹ As the Board has made clear repeatedly, however, including in its June 19 Decision, the authorization granted through an exemption is permissive,²² and the Board does not typically resolve disputes over the meaning of the

¹⁵ See, e.g., BNSF Verified Notice of Exemption, Ex. B at 1, 10.

¹⁶ Pet. 8-9.

¹⁷ See UP Pet. to Reject Notice of Exemption, Mar. 15, 2012, at 6.

¹⁸ Pet. 8.

¹⁹ Pet. 6-7, quoting Joint Operating Agreement § 1 (see UP Evidence & Argument, AB 33 (Sub-No. 277X), Feb. 9, 2012, Ex. E).

²⁰ See Pet. 7.

²¹ We note that neither UP nor BNSF made this argument.

²² June 19 Decision, slip op. at 7.

underlying contracts.²³ To the extent LDRR has concerns arising under contract law, it may seek to obtain relief in another forum.²⁴

In short, LDRR has not shown that reopening and revocation are supported by material error, new evidence, or substantially changed circumstances, or that regulation of the transaction is necessary to carry out the RTP. Therefore, the request to reopen and revoke the exemption will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request to reopen and revoke the exemption is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

²³ See, e.g., Buckingham Branch R.R.—Lease—CSX Transp., Inc., FD 34495, slip op. at 11 (STB served Nov. 5, 2004).

²⁴ See id. Similarly, LDRR's argument based on the Settlement Agreement between BNSF and UP, as restated and amended in March 2002, provides no reason to revoke the exemption in this case. See Pet. 7. The trackage rights agreement for which BNSF sought and received an exemption here was the First Supplemental Agreement, not a provision of the Settlement Agreement. Thus, LDRR's assertion that the Settlement Agreement does not provide BNSF with trackage rights over the Lockport Branch does not affect the trackage rights exemption in this case.